IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

05-CR-6116CJS

v.

VIOLETTE GAIL ELDRIDGE, et. al

Defendants.

GOVERNMENT'S MOTION TO UNSEAL AND FOR DISCLOSURE OF RULE 17(c) SUBPOENAS ISSUED UNDER SEAL ON BEHALF OF DEFENDANT VIOLETTE GAIL ELDRIDGE

Beginning is August 2007 and continuing until the present, defendant Eldridge has caused the Court to issue over 30 subpoenas under Rule 17(c) of the Federal Rules of Criminal Procedure ("Rule 17(c) subpoenas"), demanding the pretrial production of documents. While this process should have concluded in January of 2008, it appears to be ongoing.[1] All subpoenas issued by the Court on behalf of defendant Eldridge have been issued under seal thereby preventing the government from knowing the parties subpoenaed or the materials demanded. The Court, during the hearing held on January 10 and 11, 2008, indicated that it attempted to determine the relevance of the material being demanded, but had to err on the side of caution due to the Court's limited factual knowledge, thereby allowing

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[1] See Court Docket No. 175 filed February 20, 2008.

liberal demands.

It has now become apparent to government counsel that defendant Eldridge has misled the Court as to the relevance of the materials being demanded and their necessity. It also appears that some, if not all, of the requested subpoenas are being issued for the purpose of general discovery or, to delay the trial, as the materials and witnesses being subpoenaed are not relevant to the issues currently before the Court. The government requests that, in the interests of justice, the Court issue an order staying any production not already made in response to the Rule 17(c) subpoenas, unsealing the previously issued Rule 17(c) subpoenas and scheduling an evidentiary hearing to determine whether the Rule 17(c) subpoenas issued to date were proper.

Outstanding Document Requests

Counsel for defendant Eldridge initially alleged that the government intentionally withheld documents from the defendant during discovery and therefore, defendant Eldridge was required to obtain the documents through the issuance of Rule 17(c) subpoenas. The government adamantly denies the withholding of any witness or entity produced material during discovery.[2] At

[2] See government's response to defendant Eldridge's motion (Docket No.122) filed on October 10, 2007 for a more detailed challenge to defendant Eldridge's allegation.

the Court's January hearing, the government learned for the first time that individuals such as Michael Bach had been subpoenaed to produce records. Michael Bach was previously subpoenaed for his records by the government and Bach's materials have been available to defendant Eldridge over the past two years.

The government has also been contacted by two additional subpoena recipients, Richard Sowden and Warren Gross[3], both of whom indicated that they do not have relevant, beneficial or exculpatory material for defendant Eldridge regarding the crimes charged in the current indictment. Rather, Sowden indicated that he had detrimental direct evidence of "other crimes" concerning different investment activities promoted by defendant Eldridge prior to the charged investment activity in this case. Therefore, Richard Sowden is being added to the government's witness list.

Harvey Fishbeim, Esq., has petitioned this Court to quash a subpoena he received for records relating to a prior criminal case for which he was defense counsel, United States v. Frank Summa (now deceased), indicted in the Southern District of New York on or about 2002. Mr. Summa was neither a party to, or to the best of government counsel's knowledge, involved in promoting

[3] E. Warren Gross has recently filed a response with the Court (Docket No. 172) indicating that he has no responsive documents to the Rule 17(c) subpoena he received rather than the volume represented by Eldridge's defense counsel.

the fraudulent investment scheme charged in the Western District of New York. As a consequence, the relevancy, as well as, admissibility of his attorney's trial file is highly questionable.

No Legal Requirement That Rule 17(c) Subpoenas be Issued Under Seal

The text of Rule 17(c) of the Federal Rules of Criminal Procedure does not address whether court ordered subpoenas issued on behalf of the defense are to be issued under seal. Rather, how such subpoenas are issued under Rule 17(c) appears to be within the total discretion of the Court. In fact, Judge Telesca of this Court has ruled that a similar *ex parte* application for a Rule 17(c) subpoena should be denied. See United States v. Urlacher, 136 F.R.D. 550, 556 (W.D.N.Y. 1991)(Issuance of Rule 17(c) subpoenas upon *ex parte* applications denied - - issuance of and compliance with subpoenas *duces tecum* should be conducted upon notice, not in secret.) Government counsel has been unable to identify any Second Circuit precedent that requires Rule 17(c) subpoenas to be issued *ex parte* and under seal on behalf of any party.

In United States v. Nixon, the Supreme Court (citing Bowman Dairy Co. v. United States, 341 U.S. 241(1951)) addressed the fundamental characteristics of court issued Rule 17(c) subpoenas indicating that: [they] were not intended to provide a means of

discovery for criminal cases. 418 U.S. 683, 698, 94 S.Ct. 3090, 3103 (1974). The Supreme Court identified the proper test for the issuance of Rule 17(c) subpoenas, which requires that the moving party demonstrate: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.' United States v. Nixon, 418 U.S. at 699, 94 S.Ct. at 3103 (internal citations omitted).

To secure pretrial document production, the party seeking information under Rule 17(c) must show that the requested information is relevant, admissible and specific. United States v. Nixon, 418 U.S. at 699 - 700, 94 S.Ct. at 3090. It is the government's contention that an offer of proof in support of the Rule 17(c) subpoenas by defendant Eldridge would fall woefully short of meeting the requirements identified *supra*. Rather, challenges to the proof offered by defendant Eldridge would demonstrate to the Court that: the issued subpoenas have been misused as a discovery device; that the materials demanded were not precisely identified as required; and, that the demanded

materials were neither evidentiary or relevant to the matter before the Court.

Finally, an evidentiary hearing would inform the Court as to whether there has been a misuse of judicial process by defendant Eldridge based upon misleading representations provided by her defense counsel in support of the Rule 17(c) subpoenas. Upon such a finding, the Court, as an appropriate sanction, should vacate and quash the Rule 17(c) subpoenas issued on behalf of defendant Eldridge, which do not comply with the specific requirements of that rule.

No Unfair Prejudice to Defendant Eldridge

On January 16, 2008, all defendants including defendant Eldridge were required to provide the government with their witness and exhibit lists pursuant to the Court's most recent scheduling order[4]. Defendant Eldridge has failed to provide such information to government counsel, the Court or the remaining parties, despite defense counsel's representations to the contrary. Had the defendant abided by the Court's pretrial order, at this time the government would already know the witnesses to be introduced by defendant Eldridge as well as the exhibits to be offered. Therefore, the unsealing of the outstanding Rule 17(c) subpoenas would merely supply the

[4] See Court Docket No. 125 filed October 18, 2007.

government with the universe of possible witness and exhibit information that could be offered by defendant Eldridge. As indicated by the Court during its January hearing, when the responsive material is received by the Court, it will become available to all parties including the government for examination. Therefore, the identification of the material demanded through the issued Rule 17(c) subpoenas merely represents a timing difference as to when the government will become aware of the scope and nature of the material requested.

Providing the government with the identity of entities subpoenaed as well as the scope of the material demanded will allow the government to timely challenge the relevance of the material requested and to determine whether the information demanded is already available to the defendant in discovery.

Eldridge's defense counsel has only provided an *ex parte* explanation to the Court explaining how the outstanding records are material to his client's defense. However, as the Court recognizes, it does not possess the factual basis upon which to knowingly and objectively scrutinize the representations made by defendant Eldridge as to need, relevancy and admissibility.

The responses to the Rule 17(c) subpoenas noted herein, document a lack of responsive material, and demonstrate that the subpoenas are actually being utilized by defendant Eldridge as a discovery device rather than to secure specific identifiable

evidence for presentation in court as required under Rule 17(c). Unsealing the Rule 17(c) subpoenas will allow government counsel, which possesses a greater factual understanding of the case being prosecuted, to challenge the relevancy, admissibility and need for such evidence, which can then assist the Court in deciding whether to quash the outstanding subpoenas and permit the issuance of additional subpoenas.

Conclusion

It is respectfully submitted that the sampling of responses to outstanding Rule 17(c) subpoenas issued at the defendant Eldridge's request noted herein demonstrates that the Rule 17(c) trial subpoena process has been and is being violated by this defendant.

Government counsel therefore requests that the Court: order that all the outstanding Rule 17(c) subpoenas, requested by the defendant Eldridge, be unsealed; schedule an evidentiary hearing to permit government counsel to challenge the propriety of the outstanding Rule 17(c) subpoenas issued on behalf of the defendant Eldridge; and stay compliance with any of the pending Rule 17(c) subpoenas until the evidentiary hearing has been conducted.

Unsealing the outstanding Rule 17(c) subpoenas would not unfairly prejudice defendant Eldridge and would allow the Court,

as a neutral party, to address the continued need to enforce, modify, vacate and/or quash such subpoenas after having received the advantage of adversary argument by the parties.

Finally, having the Court objectively determine the continued need for compliance with outstanding Rule 17(c) subpoenas will assist the Court in affirmatively setting a firm trial date in allowing its objective determination of the need for the material demanded and the duration of time necessary for any review.

DATED: Rochester, New York, February 25, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2008, I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participant(s) on this case:

Christopher S. Ciaccio, Esq,

Scott A. Garretson, Esq.

Mark D. Hosken, Esq.

James P. Vacca, Esq.

Maurice J. Verrillo, Esq.

s/ KIM PETTIT